

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BALKAN ENERGY COMPANY

VS.

PROENERGY SERVICES
INTERNATIONAL, INC.,
PROENERGY SERVICES, LLC,
BILL SHINHOLSER, AL SIMON,
STEVE COX, JEFFREY CANNON,
J.D. ROBINSON and JOHN BRYANT

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CIVIL ACTION NO. _____

NOTICE OF REMOVAL

ProEnergy Services International, Inc. and ProEnergy Services, LLC file this Notice of Removal of a state court action styled *Balkan Energy Company v. ProEnergy Services International, Inc., ProEnergy Services, LLC, Bill Shinholser, Al Simon, Steve Cox, Jeffrey Cannon, J.D. Robinson and John Bryant*, Cause No. 09-01944 in the 95th Judicial District Court of Dallas County, Texas (the “State Court Action”).

I. PROCEDURAL BACKGROUND

1. On February 18, 2009, ProEnergy Services, LLC filed suit against Balkan Energy Company in the United States District Court for the Western District of Missouri, bearing Case No. 2:09-cv-04026-SOW (the “Federal Court Action”). The dispute in the Federal Court Action arises out of an agreement for services that the parties entered into to provide start-up and commissioning services for an electrical power generation barge located in Ghana. ProEnergy sued Balkan for \$660,833.30 in unpaid invoices and other damages. A copy of the complaint in the Federal Court Action is attached hereto as **Exhibit 1**.

2. After the filing of the Complaint in the United States District Court for the Western District of Missouri, in a race to the court house, Balkan filed its original petition in the State Court Action against ProEnergy Services International, Inc. The original petition was not served on the original defendant.

3. On May 26, 2009, Balkan filed its original answer, affirmative defenses and counterclaim against ProEnergy in the Federal Court Action. Docket No. 10, Case No. 2:09-cv-04026-SOW. A copy of Docket No. 10 is attached hereto as **Exhibit 2**. The parties are actively engaged in discovery in the Federal Court Action. The allegations in Balkan's counterclaim include a breach of contract claim nearly identical to the claim asserted in Balkan's original petition in the State Court Action.

4. On January 8, 2010, Balkan filed its first amended petition in the State Court Action. For the first time, almost one year since the filing of the original petition, Balkan sued the individual defendants. Bill Shinholser was served with the first amended petition on January 28, 2010. ProEnergy Services International, Inc. was served with the first amended petition on February 3, 2010. Al Simon, Steve Cox, Jeffrey Cannon, and John Bryant received a copy of the first amended petition on February 5, 2010 via certified mail at the ProEnergy corporate office in Sedalia, Missouri. J.D. Robinson has not been served in the State Court Action. Thus, this Notice of Removal has been timely filed, as it is being filed within thirty days from service of the first amended petition on Mr. Shinholser.

II. DIVERSITY JURISDICTION

5. This Notice of Removal is filed pursuant to 28 U.S.C. § 1441.
6. This action is properly removed to this Court as the State Court Action is pending within this district and division.

7. Removal of this action is proper under 28 U.S.C. § 1332 based on the parties' diversity of citizenship and the amount in controversy, exclusive of interest and costs.

8. Balkan is a Texas Corporation with its principal place of business located in Dallas, Texas, Dallas County. Balkan's first amended petition at ¶ 1.01.

9. ProEnergy Services International, Inc. is a Missouri Corporation with its principal place of business in Sedalia, Missouri, Pettis County.

10. ProEnergy Services, LLC is a Missouri Limited Liability Company with its principal place of business in Sedalia, Missouri, Pettis County.

11. Al Simon, Steve Cox, Jeffrey Cannon and John Bryant are all citizens of Missouri.

12. Bill Shinholser is a citizen of Texas. However, Mr. Shinholser's citizenship should be disregarded for purposes of determining jurisdiction under 28 U.S.C. §§ 1332 and 1441(b) because he has been fraudulently or improperly joined to defeat diversity jurisdiction. There is no reasonable basis for this Court to predict that Balkan might be able to recover from Mr. Shinholser in state court. *Menendez v. Wal-Mart Stores, Inc.*, 2010 WL 445470, *5 (5th Cir. Feb. 1, 2010).

13. All of the individual defendants, save and except J.D. Robinson, are represented by undersigned counsel and all consent to the removal of the State Court Action to federal court.

14. The one remaining defendant, J.D. Robinson has not been served in the State Court Action. As Mr. Robinson has not been served, his consent to removal is not required. *Rawlings v. Travelers Prop. Cas. Ins. Co.*, 2008 WL 2115606 (N.D.Tex. May 20, 2008).

15. Accordingly, there is complete diversity among the parties.

16. Where there is complete diversity among the parties and where the amount in controversy exceeds \$75,000, an action may be removed to federal court. 28 U.S.C. § 1332. To determine the amount in controversy, the court may consider actual damages, exemplary damages

and attorney's fees. *White v. FCI U.S.A., Inc.*, 319 F.3d 672, 675 (5th Cir. 2003). Where a defendant can show, by a preponderance of the evidence, that the amount in controversy is greater than the jurisdictional amount, removal is proper. *Id.* (affirming district court's conclusion that it was "more probable than not" that damages were over \$75,000 where the total amount of relief was not stated in the petition); *St. Paul Reins. Co. v. Greenberg*, 134 F.3d 1250, 1253 n. 13 (5th Cir. 1998) ("[t]he test is whether it is more likely than not that the amount of the claim will exceed [the jurisdictional minimum].") In making a determination that the claims exceed the jurisdictional amount, the district court must first examine the complaint to determine whether it is "facially apparent". *Id.*

17. Here, Balkan does not pray for a specific dollar amount of damages in its first amended petition. However, in ¶ 5.17 subsections A, B, C, D, and I, Balkan alleges that ProEnergy is liable to Balkan for costs in excess of five million dollars (\$5,000,000). In addition, Balkan asks for exemplary damages, costs and attorneys' fees. Based on the alleged damages and the allegations set forth on the face of the first amended petition, it is facially apparent that the \$75,000 threshold will more than likely be met and this Court has jurisdiction over the matter. *See., e.g., White v. FCI U.S.A., Inc.*, 319 F.3d at 675.

18. In accordance with 28 U.S.C. § 1446(a) and Local Rule 81.1, copies of the pleadings in the State Court Action, the docket sheet, together with an index of all matters filed, are attached hereto as **Exhibits 3 - 19**. No other process, pleadings or orders have been filed with the state court as of the date of the filing of this notice of removal. A certificate of interested persons is attached as **Exhibit 20**.

19. In accordance with 28 U.S.C. § 1446(d), ProEnergy will promptly give notice to all necessary parties in writing and shall file a copy of the notice of removal with the clerk of the State Court.

Respectfully submitted,

CARRIGAN, McCLOSKEY & ROBERSON, L.L.P.

By: s/ Blake E. Rizzo

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**ATTORNEYS FOR PROENERGY
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has this day been sent by United States mail, postage prepaid to:

Mitchell Madden
Thomas V. Murto III
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1755 Wittington Place, Suite 300
Dallas, TX 75234

on this 17th day of February, 2010.

s/ Blake E. Rizzo
Blake E. Rizzo